

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FADI BARGHOUTI,

Petitioner,

v.

A. NEIL CLARK, et al.,

Respondents.

CASE NO. C06-1094-RSM-MJB

REPORT AND
RECOMMENDATION

I. INTRODUCTION AND SUMMARY CONCLUSION

On August 3, 2006, petitioner Fadi Barghouti, proceeding pro se, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, alleging that he is being detained indefinitely by the U.S. Immigration and Customs Enforcement ("ICE") in violation of *Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001), and that he must be released because there is no significant likelihood that he will be removed in the reasonably foreseeable future. (Dkt. #6). Respondents have filed a motion to dismiss, arguing that ICE is in possession of a valid travel document for petitioner and is prepared to remove him to Jordan upon termination of any pending orders staying his removal. (Dkt. #13).

1 Having carefully reviewed the entire record, I recommend that petitioner's habeas
2 petition (Dkt. #6) be DENIED and respondents' motion to dismiss (Dkt. #13) be GRANTED.

3 II. BACKGROUND AND PROCEDURAL HISTORY

4 Petitioner was born in Kuwait and is a citizen of Jordan. (Dkt. #15 at L02, L54). He
5 was admitted to the United States at Seattle, Washington on or about December 12, 2005, as a
6 nonimmigrant B-1 visitor with authorization to remain in the United States for a temporary
7 period not to exceed January 13, 2006. (Dkt. #15 at L02). On January 17, 2006, ICE issued a
8 Warrant for Arrest of Alien and a Notice to Appear, placing petitioner in removal proceedings
9 and charging petitioner with removability under Section 237(a)(1)(B) of the Immigration and
10 Nationality Act ("INA"), for overstaying the authorized period of his visit to the United States.
11 (Dkt. #15 at L02-04). On January 19, 2006, ICE determined that petitioner may be released on
12 \$30,000 bond, pending a final determination by the Immigration Judge ("IJ"). (Dkt. #15 at
13 L10). At a bond redetermination hearing on February 15, 2006, the IJ reduced petitioner's bond
14 to \$15,000. (Dkt. #15 at L09).

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16 At a hearing before an IJ on March 22, 2006, petitioner admitted the allegations
17 contained in the Notice to Appear and conceded removability. (Dkt. #15 at L257). The hearing
18 was then continued to allow petitioner an opportunity to submit an application for asylum. On
19 March 29, 2006, petitioner submitted a Form I-589 application for asylum and withholding of
20 removal based on his sexual orientation. (Dkt. #15 at L14-L54). In a decision dated April 4,
21 2006, the IJ denied petitioner's applications for asylum, withholding of removal, as well as his
22 request for protection under the Convention Against Torture, finding that petitioner lacked
23 credibility, and, therefore, failed to meet his burden of proving eligibility for relief. Specifically,
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1 the IJ found that petitioner had failed to adequately explain the inconsistencies between his own
2 testimony and that of the other two witnesses; Special Agent Darrick Smalley, and petitioner's
3 wife Sharon Falzgraf. The IJ also found petitioner statutorily ineligible for voluntary departure
4 under INA § 240B(b), and ordered him removed to Qatar, or, in the alternative, to Jordan.
5 (Dkt. #15 at L249-58). On April 5, 2006, ICE redetermined petitioner's custody status and
6 ordered petitioner detained without bond. (Dkt. #15 at L10).

7 Petitioner timely appealed the IJ's decision to the Board of Immigration Appeals
8 ("BIA"). On July 10, 2006, the BIA affirmed the IJ's decision and dismissed petitioner's appeal.
9 (Dkt. #15 at L305-308). On July 25, 2006, petitioner filed a Petition for Review and
10 Emergency Motion for Stay of Removal in the United States Court of Appeals for the Ninth
11 Circuit. (Dkt. #15 at L312-15). The Ninth Circuit subsequently granted petitioner's motion for
12 stay of removal pending its review. Petitioner's petition for review is currently pending in the
13 Ninth Circuit.
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15 On August 3, 2006, petitioner filed the instant habeas petition. (Dkt. #6). On September
16 20, 2006, the government filed its return and motion to dismiss. (Dkt. #13). Petitioner filed a
17 response to the government's return and motion to dismiss on October 5, 2006. (Dkt. #16). The
18 government filed a reply on October 13, 2006. The habeas petition and motion to dismiss are now
19 ready for review.

20 III. DISCUSSION

21 A. Post Removal Order Detention and *Zadvydas*

22 Petitioner argues that he is being detained indefinitely by ICE in violation of the Supreme
23 Court's mandate in *Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653
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1 (2001). Respondents argue that petitioner's reliance on *Zadvydas* is misplaced because his 90-
2 day removal period under INA § 241(a)(1)(A) has not expired, and even if petitioner's removal
3 period has expired, it is significantly likely that he will be removed in the reasonably foreseeable
4 future. (Dkt. #13 at 3).

5 The post-removal-order detention statute, INA § 241(a)(1), 8 U.S.C. § 1231(a)(1),
6 provides for the mandatory detention of aliens awaiting removal from the United States for an
7 initial period of three months. This three months may be followed by an additional three months
8 discretionary detention during which detention remains presumptively valid. *Zadvydas*, 533 U.S.
9 at 701.¹ The Supreme Court explained that after this six-month period, the alien is eligible for
10 conditional release upon demonstrating that there is "no significant likelihood of removal in the
11 reasonably foreseeable future." *Id.* The petitioner has the burden of coming forward with "good
12 reason to believe there is no reasonable likelihood of removal in the reasonably foreseeable
13 future." *Id.* If the petitioner meets this burden, the government must produce sufficient
14 evidence to rebut petitioner's showing. *Id.*

15 Here, petitioner's claim that he is being held indefinitely in violation of *Zadvydas* lacks
16 merit because he has not demonstrated that his removal to Jordan is not significantly likely in the
17 reasonably foreseeable future. *See Zadvydas* at 701. As indicated in the record, ICE has secured
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20 ¹ In *Zadvydas*, two resident aliens challenged the constitutionality of their post-removal-
21 order detentions under INA 241(a)(6), 8 U.S.C. § 1231(a)(6), because, although no country was
22 willing to accept them, the government continued to detain them years after the expiration of the
23 90-day removal period. *See Zadvydas*, 533 U.S. at 684-86. The Supreme Court stated that "[a]
24 statute permitting indefinite detention of an alien would raise a serious constitutional problem."
25 *Id.* at 690. Applying the constitutional avoidance doctrine, the Court held that INA § 241(a)(6),
26 "read in light of the Constitution's demands, limits an alien's post-removal-period detention to a
period reasonably necessary to bring about that alien's removal" and "does not permit indefinite
detention." *Id.* at 689.

1 travel documents for petitioner from Jordan and the only thing preventing his removal is his
2 Petition for Review and related stay of removal. Once the Ninth Circuit decides his appeal, ICE
3 will remove or release petitioner. *See Bequir v. Clark*, Case No. 05-1587-RSM-JPD (Dkt. #23 at
4 3). Thus, contrary to the petitioner in *Zadvydas*, petitioner's detention is neither "indefinite" nor
5 "potentially permanent." *Zadvydas*, 533 U.S. at 690-91. Accordingly, petitioner's detention
6 complies with the mandate in *Zadvydas*.

7 B. 8 C.F.R. § 241.4

8 In his habeas petition, petitioner alleges in conclusory fashion that respondents arbitrarily
9 denied his request for release from detention by failing to consider all of the factors enumerated
10 within the government's own regulation under 8 C.F.R. § 241.4, and by not providing him an
11 "individual assessment." (Dkt. #6). This claim fails because petitioner does not specify what
12 factors respondents failed to consider or how they failed to give him an individual assessment.
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14 IV. CONCLUSION

15 For the foregoing reasons, I recommend that respondents' motion to dismiss be granted,
16 and that the action be dismissed. A proposed Order accompanies this Report and
17 Recommendation.

18 DATED this 29th day of January, 2007.

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21 MONICA J. BENTON
22 United States Magistrate Judge
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